

1 HONORABLE BENJAMIN H. SETTLE
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

9 AARON PAUL KHAMNOY,

10 Plaintiff,

11 v.

12 NATIONAL RAILROAD PASSENGER
13 CORPORATION d.b.a AMTRAK; and
DOES ONE THROUGH FIFTY,

14 Defendants.

Case No. 3:19-cv-06223-BHS

**DEFENDANT NATIONAL RAILROAD
PASSENGER CORPORATION'S
MOTION TO CONTINUE THE TRIAL
DATE AND REOPEN DISCOVERY**

**NOTE ON MOTION CALENDAR:
JUNE 17, 2022**

16 **I. INTRODUCTION & RELIEF REQUESTED**

17 On May 2, 2022, Plaintiff disclosed that he had undergone a laminectomy with discectomy
18 in early April 2022, and that his surgeon was recommending a future spinal fusion procedure.
19 With the exception of a progress note produced on May 23, 2022, no records from this procedure
20 or Plaintiff's subsequent rehabilitation period have been produced. Plaintiff has agreed to reopen
21 discovery regarding his recent and future back surgeries, but has not agreed to continue the trial
22 date even though there is not adequate time between now and the present trial date of August 23,
23 2022, even if the new medical records were received immediately.

24 Defendant National Railroad Passenger Corporation ("Amtrak") therefore moves for an
25 order continuing the trial date, currently scheduled for August 23, 2022 and reopening discovery
26 for the following purposes of (1) obtaining additional medical records relating to Plaintiff's
27 recently disclosed back surgery and new claim that an additional future surgery is necessary, (2)

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019188.0460/8988628.1

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1 obtaining Plaintiff's physical therapy records following this surgery, (3) deposing Plaintiff's
 2 orthopedic surgeon, Dr. Raj Kakarlapudi, (4) deposing Plaintiff's physical therapist, and (5) a
 3 second deposition of Plaintiff regarding events since his prior deposition, including his objective
 4 and subjective functioning before and after the recent surgery.

5 At this time, Amtrak still does not have the medical records relating to the back surgery,
 6 or even his physical therapy treatment notes, and it needs additional time to complete discovery,
 7 including a deposition of Plaintiff's orthopedic surgeon and physical therapist, and a further
 8 deposition of Plaintiff. Thus, this motion is necessary. For the reasons set forth below, Amtrak's
 9 motion to continue the trial date and other deadlines should be granted as follows:

DEADLINE	CURRENT DATE	NEW DATE
FIVE DAY JURY TRIAL set for 9:00 AM	8/23/2022	3/28/2023
All motions related to discovery must be filed by	8/23/2021	9/5/2022
Discovery completed by	9/20/2021	10/3/2022
Pretrial conference will be held at 11:00 AM on	8/8/2022	3/13/2023
Agreed neutral statement of the case and deposition designations due by	8/2/2022	3/6/2023

18 **II. PERTINENT PROCEDURAL HISTORY AND RELEVANT FACTS**

19 Plaintiff had multiple surgical procedures between February 2018 and December 2019.
 20 Declaration of Andrew G. Yates ("Yates Decl."), June 2, 2022, at ¶ and Ex. A attached thereto.

21 On December 19, 2019, Plaintiff filed his complaint, alleging that he sustained injuries as
 22 a result of the derailment of Amtrak Train 501. Dkt. 1.

23 On March 18, 2020, this Court entered an order setting jury trial and pretrial dates. Dkt. 9.

24 Subsequently, the parties exchanged discovery throughout the course of this litigation up
 25 to the September 20, 2021 discovery cutoff. *See* Dkt. 9.

1 On January 5, 2022 the parties filed pretrial motions and trial briefs and had a pretrial
 2 conference on January 5, 2022. Dkt. 31.

3 On January 25, 2022, this Court issued a minute order resetting the trial and certain pretrial
 4 deadlines due to COVID concerns. The Court also scheduled a second pretrial conference for
 5 August 8, 2022. Dkt. 33, 35.

6 On April 5, 2022—for the first time in approximately 28 months—Plaintiff underwent a
 7 surgical procedure (“Revision Lumbar Laminectomy with Discectomy @ Right L4-5”).
 8 Throughout the course of this litigation, only the January 13, 2020 note “indicated” a potential
 9 need to proceed with a lumbar laminectomy. Yates Decl., at ¶ 3 and Ex. B attached thereto. Since
 10 Plaintiff did not undergo that procedure at any time between January 20, 2020 and the September
 11 21, 2021 discovery cutoff, and since Plaintiff last saw his orthopedic surgeon on January 13, 2020
 12 based on the records Amtrak had,¹ Amtrak was under the impression that Plaintiff’s pain had
 13 improved and there was no need to undertake that procedure. For reasons unknown to Amtrak,
 14 Plaintiff elected to undergo the lumbar laminectomy seven months after the discovery cutoff.
 15 Yates Decl., at ¶ 4. In fact, Plaintiff never mentioned anything about undergoing this procedure
 16 in his pretrial motions or trial briefs. It was not until May 2, 2022 that Plaintiff disclosed this
 17 surgical procedure. Yates Decl., at ¶ 5 and Ex. C attached thereto.

18 Then, on May 23, 2022, Plaintiff supplemented his prior discovery production with the
 19 most recent physical therapy notes available. Yates Decl., at ¶ 6 and Ex. D attached thereto.
 20 According to one of these notes, dated May 19, 2022, Plaintiff reported that after the lumbar
 21 laminectomy procedure he experienced “less pain with: prolonged standing, prolonged sitting.
 22 Patient’s pain is mild to moderate and improving.” Ex. D (pp. 3-6). Dr. Raj Kakarlapudi referred
 23 Plaintiff for “post-op lumbar spine rehabilitation to restore strength, stability, and range of motion”

24
 25 ¹ According to Plaintiff’s May 23, 2022 supplemental discovery, Plaintiff saw Dr. Kakarlapudi on
 26 October 22, 2020 for the first time after January 13, 2020. Yates Decl., at ¶ 6 and Ex. D attached
 27 thereto. However, Amtrak does not have any records relating to the October 22, 2020 date of
 service. Nor does Amtrak have treatment notes relating to the January 26, 2022 date of service
 with Kim Nguyen or March 29, 2022 with Cherelle Edwards. Yates Decl., at ¶ 7.

1 and “will recommend continued conservative care to allow additional time to heal. Goals are to
 2 restore normal function, relieve pain and symptoms....” *Id.* Amtrak does not have any of
 3 Plaintiff’s physical therapy notes.

4 Additionally, Plaintiff’s counsel noted in his May 23, 2022 email that Dr. Kakarlapudi has
 5 recommended a spinal fusion. Ex. C. Amtrak does not have any records relating to this
 6 recommendation.

7 **III. AUTHORITY AND ARGUMENT**

8 **A. Standard for Granting Continuances**

9 Federal Rule 16 governs motions to modify scheduling orders and states that a court may
 10 modify a schedule for “good cause.” Fed. R. Civ. P. 16(b)(4); *see also Johnson v. Mammoth*
11 Recreations, Inc., 975 F.2d 604,608 (9th Cir. 1992) (“[t]he district court may modify the pretrial
 12 schedule if it cannot reasonably be met despite the diligence of the party seeking the extension.”).
 13 “[T]he focus of the inquiry is upon the moving party’s reasons for seeking modification.” *Id.* Due
 14 to Plaintiff’s recent surgical procedure and Plaintiff’s late disclosures, Amtrak has good cause to
 15 ask for an extension of the trial date and related deadlines.

16 To consider whether a motion for a continuance should be granted, the Ninth Circuit has
 17 identified four factors to consider: (1) the moving party’s diligence in its efforts to ready its defense
 18 prior to the date beyond which a continuance is sought; (2) whether the continuance would have
 19 served a useful purpose if granted; (3) the extent to which granting the continuance would have
 20 inconvenienced the court, opposing party, and witnesses; and (4) the amount of prejudice suffered
 21 by the moving party due to the denial of the continuance. *United States v. Zamora-Hernandez*,
 22 222 F.3d 1046, 1049 (9th Cir. 2000) (citing *United States v. Flynt*, 756 F.2d 1352, 1359) (9th Cir.
 23 1985)). “[T]he weight given to any one [of these factors] may vary from case to case.” *United*
24 States v. Kloehn, 620 F.3d 1122, 1127 (9th Cir. 2010) (quoting *Armant v. Marquez*, 772 F.2d 552,
 25 556 (9th Cir. 1985)).

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2 **B. The Recent Lumbar Laminectomy Surgery and the New Recommendation for**

3 **Spinal Fusion Surgery Require a Continuance**

4 Throughout the course of this litigation, Amtrak has acted with diligence and was unaware
 5 that Plaintiff was scheduled for a lumbar laminectomy surgery or that a treating provider
 6 recommended spinal fusion surgery. Although the life care plan refers to a lumbar laminectomy,
 7 this was apparently a topic that Plaintiff's life care planner orally discussed with Dr. Kakarlapudi
 8 in July 2021. *See Ex. E (Preliminary Life Care Plan).* With the exception of a single reference
 9 from January 13, 2020 stating that a lumbar laminectomy was "indicated" (Ex. B), there are no
 10 other medical records reflecting this recommended procedure. In fact, all of the orthopedic
 11 procedures that the life care planner incorporated into his life care plan were discussed with Dr.
 12 Kakarlapudi in July 2021. *See Ex. E (Preliminary Life Care Plan).* No medical documentation
 13 was attached in support of the life care plan. *Id.* Also, according to the medical records that
 14 Amtrak received, Plaintiff last saw his orthopedic surgeon on January 13, 2020 (Ex. B), so Amtrak
 15 had no reason to believe that Plaintiff would undergo the procedure 28 months later. The
 16 disclosure that Dr. Kakarlapudi will attempt to testify that Plaintiff needs a future fusion procedure
 17 is entirely new.

18 Amtrak needs a four-month continuance to mitigate the prejudice caused by these late
 19 disclosures. Specifically, Amtrak needs to obtain the records from the new providers, including
 20 the orthopedic surgeon who performed the lumbar laminectomy and has apparently recommended
 21 a spinal fusion, as well as the physical therapist who treated Plaintiff post-operatively. Amtrak
 22 also seeks to redepose Plaintiff to get an understanding of his present condition and the extent of
 23 any functional limitation he is claiming. This additional discovery is necessary given that Plaintiff
 24 seeks millions of dollars in medical expenses as well as millions of dollars to move into an assisted
 25 living facility due to his alleged physical limitations. *See Ex. E.* Thus, the discovery Amtrak is
 26 seeking is essential to testing the legitimacy of Plaintiff's future economic and non-economic

1 claims. Amtrak clearly is entitled to develop its defenses to these claims through discovery
2 regarding the new records, medical providers, and Plaintiff himself.

3 The continuance would serve a useful purpose because it will give Amtrak time to obtain
4 new discovery, review it, and determine what follow up is necessary, including but not limited to
5 depositions of Plaintiff's treating providers. There is no reason to believe that the requested
6 continuance would cause any significant inconvenience. If Amtrak's request for a continuance is
7 denied, Amtrak will be prejudiced.

8 Additionally, a continuance will allow Amtrak to obtain receipts to Plaintiff's billing
9 statements as well as treatment notes and review Plaintiff's medical records to determine if these
10 expenses are appropriate. Ultimately, allowing Amtrak to conduct meaningful discovery will help
11 it evaluate the strengths and weaknesses of Plaintiff's claims and Amtrak's defenses at trial. All
12 of these factors weigh in favor of granting Amtrak's motion for a continuance.

13 **IV. CONCLUSION**

14 For the reasons set forth above, this Court should grant Amtrak's motion to continue the
15 trial date and reopen discovery and instruct the Clerk to issue a new order resetting the above dates.
16

17 DATED: June 2, 2022

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